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In The

Supreme Court of the United States

October Term, 1995

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

JUSTINE LAI and ELVIRA VIERNES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner respectfully submits this Reply Brief pursuant to Rule 15.6 to address arguments first raised in Respondents' brief in opposition. Specifically, Respondents argue that the disputed Ninth Circuit decision[1] 1) rests on two separate holdings (Brief in Opp., pp. 5-7), 2) is consistent with this Court's recent decision in *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S. Ct. 1920 (1995) (Brief in Opp., pp. 12-14), and 3) is of limited

[1] *The Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

impact because of an amendment to the National Association of Securities Dealers ("NASD") Code of Arbitration. (Brief in Opp., pp. 15-16).

I. The Ninth Circuit Panel Did Not Make Two Holdings

The Ninth Circuit's decision rests solely on a misinterpretation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. 42 U.S.C. § 2000e, *et seq.*, as amended. After noting Section 118 of that Act, citing to a portion of the legislative history of this uncodified section, and opining that significant differences exist in the remedies and procedural protections of arbitral and judicial forums, the Ninth Circuit panel concluded, 2-1, "that a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration." 42 F.3d at 1305.

Everything the Ninth Circuit thereafter wrote was derivative of its foregoing conclusion. From its faulty interpretation of the 1991 Act and selective reading of its legislative history, the panel majority concluded it had a license to interpret arbitration agreements different from other contracts.[2] Specifically, an arbitration agreement, at least as it related to statutory employment discrimination claims, would be valid only if the party now resisting

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[2] *See* discussion *infra* at pp. 3-5. The FAA prohibits such differential treatment. 9 U.S.C. § 2. *See also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

arbitration "knowingly contract[ed] to forego . . . statutory remedies in favor of arbitration." 42 F.3d at 1305. The panel then found that the plaintiffs below, Respondents here, "could not have *understood* that in signing [the U-4 Form], they were agreeing to arbitrate sexual discrimination suits." 42 F.3d at 1305 (emphasis added).[3] The court so found because the U-4 form – mistakenly referred to as "the employment contract with Prudential that plaintiffs executed" – "did not describe any disputes the parties agreed to arbitrate." 42 F.3d at 1305.[4] Accordingly, in the panel majority's mind, the newly applicable subjective *knowing agreement* standard was not met.[5] Thus, the panel concluded, plaintiffs "were not bound by

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[3] For purposes of its analysis, the panel *assumed* that the plaintiffs "were aware of the nature of the U-4 form." 42 F.3d at 1305. Therefore, the panel, in addition to requiring a showing that the party "understood" the terms of an executed arbitration agreement, also required a showing that the party understood the "nature" of the agreement.

[4] The panel ignored the fact that this Court has endorsed arbitration agreements equally broad as the U-4 form language at issue here. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 624 n.13; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 223, 238 (1987); and *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 478-83 (1989).

[5] Of course, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and its ample progeny did not impose a "knowing agreement" standard and, consistent with the federal policy favoring arbitration, compelled arbitration of statutory employment discrimination claims. Under the facts and circumstances in those cases, however, the *Lai* panel would rule otherwise. There is, indisputably, a decisional conflict among the circuits in outcome.

any valid agreement to arbitrate" their statutory discrimination claims. 43 F.3d at 1305.[6]

The panel majority also opined, in pure dicta, that "even if appellants had signed a contract containing the NASD arbitration clause [to which the court presumably was referring to the NASD Code of Arbitration], it would not have put them on notice that they were bound to arbitrate Title VII claims." 42 F.3d at 1305. That dictum does not support Respondents' assertion that the panel actually made two separate holdings. The panel majority's decision rested solely on the fatal deficiencies it found in the one document executed by Respondents, *i.e.*, the U-4 form.

Moreover, the panel certainly would have applied its subjective *knowing agreement* standard to the Code of Arbitration language had it deemed that language relevant.[7] Petitioner has challenged the court's adoption of

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[6] The subjective "knowing agreement" standard is the by-product of the Congressional concern the panel majority erroneously discerned from the 1991 amendments to Title VII and a portion of its legislative history. Since the legislative history of Section 118 of the 1991 Civil Rights Act lacks any semblance of unison – that is, no "clearly expressed" legislative intent is evident – Section 118's textual expression of encouragement should be regarded as conclusive. *Reves v. Ernst & Young*, ___ U.S. ___, 113 S. Ct. 1163, 1169 (1993) (citing decisions). The panel majority erred, therefore, in giving determinative weight to the discordant legislative history of Section 118.

[7] The appellate court opined that the Code of Arbitration language "would not put [Respondents] *on notice* that they were bound to arbitrate Title VII claims." 42 F.3d at 1305 (emphasis added). This "on notice" requirement derives from the court's adoption of a special subjective knowing agreement standard

that standard and its rejection of the long-established presumption in favor of arbitrability. Accordingly, even if the panel majority made two holdings as Respondents contend, both holdings are subsumed in the first question presented to this Court by Petitioner.[8]

The panel majority's decision has created an unseemly hierarchy among the federal employment discrimination laws, since some forms of discrimination – that proscribed by the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 – will be associated with a *de novo* trial right, whereas other forms of employment discrimination – that proscribed by the Age Discrimination in Employment Act and the Civil Rights Act of 1866 – will be subject to binding pre-dispute arbitration agreements. Indeed, the panel majority's rationale even would distinguish between various forms of racial discrimination (Title VII versus the Civil Rights Act of 1866: § 1981 claims would have to be arbitrated, whereas Title VII claims would not have to be). With respect to state-law employment discrimination claims, this potential hazardous dichotomy among such claims will result within the text of a *single* state statute, *e.g.*, California's Fair Employment and Housing Act which proscribes age (presumptively arbitrable) as well as other forms of discrimination

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for application in post-1991 Civil Rights Act employment discrimination cases.

[8] Judge Norris in his concurring opinion takes issue with the panel majority's *holding*, in the singular, "that Congress intended that employees can only *knowingly* waive their right to adjudicate employment discrimination claims." 43 F.3d at 1306 (emphasis in original).

prohibited by Title VII (presumptively non-arbitrable). *See* Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 Conn. L. Rev. 521, 581-82 (1994).

II. The Ninth Circuit's Decision Is Inconsistent With This Court's Recent Decision In *First Options Of Chicago, Inc. v. Kaplan*

To the extent this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S. Ct. 1920 (1995), is relevant to the instant Petition, it is not for the purposes cited by Respondents. There is no dispute here that a court, not an arbitrator, had the primary power to decide if the parties agreed to arbitrate the merits of their dispute. Thus, the answer to the "who" question regarding arbitrability – the focus of the Court's decision in *First Options* – is not at issue.

The *First Options* decision is instructive, nevertheless. As it had earlier in last year's term, the Court in *First Options* counselled lower courts that in deciding whether the parties agreed to arbitrate a certain matter, with exceptions not relevant here, they should apply ordinary state-law principles that govern the formation of contracts. ___ U.S. ___, 115 S. Ct. at 1924. *See also Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___, 115 S. Ct. 1212, 1219 (1995).

California law principles that govern the formation of contracts are well-established. Unless Section 118 of the Civil Rights Act of 1991 somehow trumped those principles, the panel majority's decision is inconsistent

with the teachings of this Court, as most recently pronounced in *Mastrobuono* and *First Options*, in that it did not apply those principles to the critical interpretation of the U-4 form language at issue.

Under California law, the intent of the parties determines the meaning of the contract. Cal. Civ. Code § 1636. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible," subject to statutory provisions not applicable here. Cal. Civ. Code § 1639. "The relevant intent is 'objective' – that is, the intent manifested in the agreement and by surrounding conduct – rather than the subjective beliefs of the parties. [citations omitted] For this reason, the true intent of a party is irrelevant if it is unexpressed." *United Commercial Insurance Service, Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 660 (1992).

Here, Respondents agreed to arbitrate "any dispute, claim, or controversy" that arose between them and Petitioner "arising in connection with the business" of Petitioner. App. 6-7, 18-19. Even ignoring the applicable presumption in favor of arbitration and the well-established rule that arbitration should be upheld unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation covering the asserted dispute, the application and effect of the "any dispute, claim, or controversy" language is certainly broad enough to encompass the parties' underlying disputes. *See Vianna v. Doctors' Management Co.*, 27 Cal. App. 4th 1186, 1189-90, 33 Cal. Rptr. 2d 188, 189-90 (1994).

The Ninth Circuit's decision is inconsistent with the controlling state-law principles of contract interpretation and, thus, contrary to this Court's command in *First Options* and *Mastrobuono*.

III. The Impact Of The Ninth Circuit's Decision Will Not Be Limited As A Result Of Amendments To The NASD's Code Of Arbitration

Respondents suggest that the Ninth Circuit's decision will apply only to cases which involve U-4 forms executed before October 1, 1993. (Brief in Opp., pp. 15-16). Although it is obvious why Respondents make this suggestion, they point to nothing in the language of the decision to support the contention and, as shown below, lower courts already are following the panel's decision into error by failing to enforce arbitration agreements.

In fact, the decision, on its face, applies to all commercial arbitration agreements. In the absence of a showing that a plaintiff has knowingly agreed to submit statutory employment discrimination claims to arbitration, she will not be required to submit such claims to arbitration. The court found the arbitration agreement here (the U-4 form) fatally defective because it "did not purport to describe the types of disputes that were to be subject to arbitration." 42 F.3d at 1305. Presumably *any* arbitration agreement that was similarly "defective"

would be deemed invalid, at least for purposes of statutory employment discrimination claims.[9]

Moreover, district courts in the Ninth Circuit do not share Respondents' limited reading of the decision at issue here. For example, United States District Judge William H. Orrick felt obliged to disregard a Ninth Circuit order favoring arbitration because the *Lai* panel's decision represents an "intervening change in the law." *Hurst v. Prudential Securities, Inc.*, No. C-90-2930, 1995 WL 419742, at *6 (N.D. Cal. July 10, 1995). As a result, Judge Orrick concluded that he did not have to comply with the earlier unpublished order requiring arbitration of Hurst's claims, including a claim under Title VII. The earlier appellate panel had rejected Hurst's claim that she did not knowingly and voluntarily agree to arbitrate her Title VII claims and, instead, had disposed of the appeal by relying on this Court's decision in *Gilmer* and the Ninth Circuit's decision in *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992). *Hurst*, 1995 WL 419742, at *3. In effect, Judge Orrick views the decision at issue here to represent a change in the law from that represented by the *Gilmer* and *Mago* decisions.

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[9] The *Lai* decision has been cited by plaintiffs attempting to avoid judicially-compelled arbitration of statutory employment discrimination claims in situations that do not involve a U-4 form arbitration agreement. *See, e.g., Maye v. Smith Barney*, No. 95-C-1878, 1995 WL 493091, at *4 (S.D.N.Y. Aug. 17, 1995); *Gateson v. ASLK-Bank, N.V./CGER-Banque S.A.*, No. 94-C-5849, 1995 WL 387720, at *3 (S.D.N.Y. June 29, 1995); and *Williams v. Raley's Superstores, Inc.*, No. 94-C-3867, 1995 WL 20462, at *4 (N.D. Cal. Jan. 13, 1995).

CONCLUSION

Because of the uncertainty that inevitably attends judicial interpretation of legislative history, confusion about the effect of the legislative history of the 1991 Civil Rights Act (as well as the effect of the comparable legislative history of Section 118's analog in the ADA, Section 513) likely will persist pending this Court's pronouncement. Absent this critical judicial resolution, uncertainty, delay and expense which are inconsistent with arbitration's mission to provide swift, efficient dispute resolution will surely prevail. Accordingly, Petitioner respectfully requests that its Petition for Certiorari be granted.

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Respectfully submitted,

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